In the Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-344

ANTON N. J. HEYN,

Petitioner

versus

BOARD OF SUPERVISORS OF LOUISIANA STATE UNIVERSITY AND AGRICULTURAL AND MECHANICAL COLLEGE, HOMER L. HITT, GEORGE C. BRANAM, WILLIAM B. GOOD, and MANUEL L. IBANEZ,

Respondents

BRIEF BY RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Rutledge C. Clement, Jr.
Harry A. Rosenberg
Phelps, Dunbar, Marks, Claverie & Sims
1300 Hibernia Bank Building
New Orleans, Louisiana 70112
Telephone: (504) 566-1311

Counsel for Respondents

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

INDEX

TABLE OF AUTHORITIES

PAGE NO.

CASES:

TABLE OF AUTHORITIES (Continued)

PAGE NO.

TABLE OF AUTHORITIES (Continued)

TABLE OF AUTHORITIES (Continued)

TABLE OF AUTHORITIES (Continued)

TABLE OF AUTHORITIES (Continued)

OTHER AUTHORITIES:

TABLE OF AUTHORITIES (Continued)

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977

NO. 77 - 344

ANTON N. J. HEYN,

Petitioner

versus

BOARD OF SUPERVISORS OF LOUISIANA STATE UNIVERSITY AND AGRICULTURAL AND MECHANICAL COLLEGE, HOMER L. HITT, GEORGE C. BRANAM, WILLIAM B. GOOD, and MANUEL L. IBANEZ

Respondents

BRIEF BY RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

QUESTIONS PRESENTED

I. With respect to claims brought under Title 42 U.S.C. Section 1983 for an alleged intentional and tortious violation of civil rights and filed in a Federal Court sitting in Louisiana, is not the Louisiana one-year statute of limitations for torts applicable?

A. Does the Supremacy Clause affect the determination that the Louisiana one-year statute of limitations for torts is applicable and controlling in a 42 U.S.C. § 1983 suit filed in a Federal Court sitting in Louisiana?

B. Is administrative action or the allegation of a continuous tort sufficient to toll the Louisiana one-year statute of limitations for torts and civil rights actions brought pursuant to Title 42 U.S.C. § 1983?

II. Did not the Trial Court act within its discretion in dismissing as moot petitioner's untimely motion for leave to file an Amended Complaint for alleged defamation after the Final Pretrial Conference and in view of the propriety of defendants' motions for dismissal and for summary judgment?

III. Did not the Trial Court properly grant summary judgment with respect to all alleged civil rights violations which occurred during or after the one-year period immediately prior to the filing of the original Complaint in that petitioner failed to demonstrate an unconstitutional abridgment of a protected liberty or property interest under the Fourteenth Amendment?

STATUTORY PROVISIONS INVOLVED

Title 42 U.S.Code, Section 1983 provides:

"Every person who, under the color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action of

law, suit in equity, or other proper proceeding for redress."

Louisiana Civil Code, Article 3536, provides in pertinent part:

"The following actions are also prescribed by one year:

* * * * *

That for injurious words, whether verbal or written, and that for damages caused by animals, or resulting from offenses or quasi offenses."

STATEMENT OF THE CASE

There is no special or significant reason why certiorari should be granted herein. This civil rights suit, brought pursuant to 42 U.S.C. § 1983, was filed on July 30, 1973, by a 71-year old (his present age), white-male protestant, who was (prior to retirement in May of 1976) a tenured full professor in the Department of Biology at the University of New Orleans (an integral part of the Louisiana State University System), against University officials who continuously from 1964 made every effort to accommodate and work with him. The suit was *not* filed as a class action and it was *not* filed pursuant to Title VII of the Civil Rights Act of 1974, as amended, 42 U.S.C. § 2000-e 5,*et seq*.

Since retirment, petitioner Heyn has had absolutely no relationship with U.N.O., except for the purely honorary title of Professor Emeritus. In addition to the present litigation, petitioner currently is the plaintiff in a state court def-

amation action which he filed against the University and various officials in March, 1976, in Civil District Court, Parish of Orleans, State of Louisiana, requesting trial by jury.

The presence of state action is not disputed, with the basic controversy being the correct statute of limitations to be applied in cases such as this. The other fundamental issue is whether the treatment received by plaintiff from defendants was of constitutional magnitude, *i.e.*, was Professor Heyn at any time deprived of a constitutionally protected liberty or property interest. The two lower federal courts, consisting of one District Judge and three Circuit Judges, have unanimously held that this case is governed by a one-year limitations period and that, moreover, the non-prescribed portion of the petitioner's claim could not withstand a motion for summary judgment. *Heyn v. Board of Supervisors of L.S.U.*, 417 F.Supp. 603 (E.D. La. 1976), *aff'd mem.*, 550 F.2d 1282 (5th Cir. 1977), *rehearing denied*, 553 F.2d 100 (5th Cir. 1977).

FACTUAL BACKGROUND

Petitioner, Professor Heyn, arrived at Louisiana State University in New Orleans (now the University of New Orleans), in the fall of 1963, whereupon he commenced his duties as full Professor of Biology and Chairman of the Department of Biology. Prior to arrival at U.N.O., petitioner taught at various educational institutions after immigrating to this country from the Netherlands in 1948. (R. 421). After one year at U.N.O., Professor Heyn, in accordance with a pre-employment agreement,was given academic tenure, meaning that he could not be terminated except for cause. Thus, Heyn remained at U.N.O. until his retire-

ment at age 70, in May of 1976, although he ceased to be a departmental chairman after 1965. It is undisputed that soon after acquiring full tenure rights, Professor Heyn on numerous occasions, if not constantly, found fault with those around him.

The record is replete with instances of friction between Heyn and his superiors (Dean Carlton, who hired Heyn, was the first; thereafter, Drs. Hitt, Branam, Ibanez, and Laseter), contemporaries (Drs. Dundee, Bryan and Ibanez), and subordinates (such as secretaries, graduate students, and undergraduate students). (R. 423, pp. 27-28; R. 483, pp. 45-57; R. 599, p. 141, pp. 244-245; R. 685 [footnote 5]). Similarly, the documents in the record portray an unending effort by the U.N.O. administration to accommodate the desires of this faculty member, numerous instances of good faith attempts to effect amicable resolutions and viable solutions to the problems that continually arose between Heyn and respondents, as well as between Heyn and other members of the faculty, administration, business department, and student body. See, *e.g.*, R. 421 (Heyn Depo. Exhibits 5-17). Painstaking and patient efforts were expended to insure that Dr. Heyn received even-handed and impartial treatment and no showing of arbitrariness appears in the record. (R. 295-394, R. 423, R. 483, R. 599, R. 259, R. 254, R. 671-673.)

Throughout the more than four years of this litigation, respondents have conceded that petitioner was a teacher and researcher of arguably average competence. At best, his performance, participation and contribution to U.N.O. have likewise been average. (R. 421, Exs. 5-17; R. 423, pp. 175-177; R. 483, pp. 65-66, 90-91, 149-154; R. 599, pp. 128-130, 157-158; and Hitt Depo. [Part II], pp. 18-19).

Needless to say, had the administrators formed the firm opinion that Heyn was incompetent, then they would have been derelict in the performance of their duties for not taking action to protect the University, an instrumentality of the State, by stripping Heyn of his tenure and discharging him; such action was never taken.

As Professor Heyn has unambiguously stated, the respondents have *never* made or brought public charges against him concerning his professional or private conduct. (R. 421, Heyn Deposition at pp. 100-101.) All personnel actions taken by respondents (as well as by Dean Carlton and Dr. Laseter, neither of whom were named as defendants) with respect to Heyn were the result of earnest deliberations and subjective value judgments made within their sound administrative discretion; *e.g.*, courses assigned, class schedules, salary adjustments, and professional and clerical assistance. This discretion is granted to respondents by law and regulation. (R. 599, pp. 58-59, and Hitt Depo. [Part II], p. 54 and pp. 68-69.) There are no facts to support the contention that Heyn was ever treated capriciously, frivolously, arbitrarily, or maliciously. For example, consider R. 254, pp. 197-198; R. 428, pp. 251-252; R. 599, p. 108, p. 131, R. 295-394, and Hitt Depo. (Part II), pp. 70-71.

All decisions regarding Heyn's compensation as a faculty member were made with due regard for the limited availability of funds and the relative merits of others deserving of salary increases. See, *e.g.*, R. 423 (Branam Depo.) pp. 159-162. As stated in the U.N.O. Faculty Handbook, page 25 (Heyn Depo. Ex. 3, R. 421), discussed in Professor Heyn's Deposition at pp. 29-30 (R. 421), with respect to salaries and salary adjustments, the University policy is as follows:

> "The University does not operate on a fixed salary scale. Salaries are reviewed annually and adjustments recommended within the framework of available funds .... Increases in salary may result from promotion in rank, from general raises throughout the University, or from recognition of individual merit."

Also of importance is the University policy on merit increases in compensation as stated in the widely promulgated U.N.O. Faculty Handbook (R. 421, Ex. 3):

> "Merit increases are recommended by the deans after consultation with their department chairmen. They are allocated in recognition of distinguished attainment and service. Seniority is considered, but it is never of itself a factor in the absence of other claims. The attempt is made to evaluate each individual in terms of his own ability and scholarly contribution, or in terms of his creative and artistic contributions, rather than in terms of the renown of his degree-granting institution. Scholarly publications as well as participation in scholarly meetings and association activities are certainly major factors in salary determinations, as are the evaluations by the dean and chairman of a faculty member's teaching performance, his contribution to committee work, and other services to the department, college, and university."

Since being employed at U.N.O. in 1963, Professor Heyn's annual salary for each of the thirteen (13) ensuing academic years has been as follows (R. 423, Branam Depo. pp. 180-184):

(a) 1963-1964 (Heyn's First Year at U.N.O.)	$10,000.00
(b) 1964-1965	11,800.00
(c) 1965-1966	11,800.00
(d) 1966-1967	11,800.00
(e) 1967-1968	12,000.00
(f) 1968-1969	12,000.00
(g) 1969-1970	12,350.00
(h) 1970-1971	13,585.00
(i) 1971-1972	14,943.00
(j) 1972-1973	16,437.00
(k) 1973-1974	17,658.00
(l) 1974-1975	18,541.00
(m) 1975-1976 (Terminal Year)...	18,900.00

In his thirteen years as a U.N.O. faculty member, the petitioner realized nine salary increases to the extent that his compensation almost doubled. In no instance was there a decrease in the amount of real income received by Dr. Heyn. It is worth noting that prior to approximately 1970, the annual rate of inflation was considerably less than in the

post-1970 period. Dr. Heyn asserts on the one hand that he is a world-famous teacher and researcher, and that U.N.O. was truly fortunate to have such a tenured faculty member; on the other hand, he does not explain why, as such a renown personage, he accepted a position in 1963 paying $10,000.00 per year and why he remained for the closing thirteen years of his professional career despite the fact that, according to him, he was never appreciated or given the preferential treatment that he sought.

The *liberty* interest claimed by Heyn to have been abridged concerns the constitutional guarantee of freedom of expression. There is *no* claim of an infringement of a protected *property* interest. This First Amendment abridgment was alleged relative to an internal University controversy concerning whether U.N.O. should remain a part of the statewide L.S.U. System and whether the University's name should be changed from "L.S.U.N.O." to "U.N.O." even though there was no breaking away from the L.S.U. System. In fact U.N.O. has remained an integral part of the State's System, but the name change did occur.

Despite a prolonged and expensive discovery program, the petitioner was singularly unsuccessful in substantiating his conclusory and conjectural allegations to the effect that because he favored U.N.O.'s remaining in the L.S.U. System he was victimized. In fact, as discovery progressed it became crystal clear that the respondents were extremely vocal in supporting the contention that U.N.O. remain within the L.S.U. System. This was the same side of the argument taken by petitioner Heyn. The change of name from L.S.U.N.O. to U.N.O. was a change that had no substantive bearing on the structure of U.N.O. or its relationship to the

state-wide System. The important point is that the respondents, Hitt, Branam, Good, and Ibanez, were in *agreement* with Heyn on this issue of separation from the L.S.U. System, and thus the claim of discrimination because of the free exercise of First Amendment rights was never substantiated in the Court below.

Moreover, as the Trial Court held, the claims of discrimination for the period of over one year prior to the filing of suit were and are barred by the statute of limitations. Clearly, Heyn was unable to seriously allege discrimination in the applicable time period (July 31, 1972, through July 30, 1973) and this is further illustrated by his failure to name as a defendant Dr. John Laseter, the Chairman of the Department of Biology since 1970. It is conceded that it is the Department Chairman who determines course schedules and has the major impact on salaries and salary adjustments. Nevertheless, Laseter was not made a party and, therefore, it is difficult to understand how Heyn can seriously allege discrimination in the post-July 1972 period (*i.e.*, one year prior to filing suit).

REASONS FOR DENIAL OF THE PETITION FOR WRIT OF CERTIORARI

I. *Statute of Limitations*

The District Court and the Fifth Circuit have conscientiously and correctly followed the directions of this Court in applying the one-year prescriptive period of Louisiana Civil Code, Article 3536, to the claims brought by petitioner Heyn under the Civil Rights Act of 1871 (Ku Klux Klan Act), 42 U.S.C. § 1983, enacted pursuant to the Fourteenth

Amendment to the Federal Constitution. Both *Pierson v. Ray*, 386 U.S. 547, 555-56 (1967), and *Monroe v. Pape*, 365 U.S. 167, 187 (1961), teach that " § 1983 [should] be read against the background of tort liability." *Whirl v. Kern*, 407 F.2d 781, 791 (5th Cir.), *cert denied*, 396 U.S. 901 (1969); *Bryan v. Jones*, 519 F.2d 44, 45 (5th Cir. 1975). Likewise, this Court has expressly directed that federal courts adjudicating cases filed under § 1983 should look to and follow the analogous statute of limitations applied by the forum state in similar matters. *O'Sullivan v. Felix*, 233 U.S. 318 (1914).

On this very issue the Fifth Circuit Court of Appeals has in the past year decided three cases, in addition to *Heyn*, that specify the application of the Louisiana prescriptive period for *torts* in civil rights actions arising under either 42 U.S.C. § 1981 or § 1983. *Page v. U.S. Industries, Inc.*, 556 F 2d 346, 352 (5th Cir. 1977); *Ingram v. Steven Robert Corp.*, 547 F.2d 1260, 1263 (5th Cir. 1977); *Kissinger v. Foti*, 544 F.2d 1257, 1258 (5th Cir. 1977); see also *Mouriz v. Avondale Shipyards,Inc.*, 428 F.Supp. 1025, 1026 (E.D. La. 1977); *Williams v. United States*, 353 F. Supp. 1226, 1230 (E.D. La. 1973); *Smith v. Olinkraft, Inc.*, 404 F.Supp. 861 (W.D. La. 1975).

The position of the Fifth Circuit is now crystal clear and it should be noted that neither *Page* nor *Ingram*, the definitive decisions, were cited in Professor Heyn's Petition for Certiorari. Instead, petitioner has continued to rely (see, *e.g.*, page 16 of the Petition by Dr. Heyn) on the rejected rationale of *Boudreaux v. Baton Rouge Marine Contracting Co.*, 437 F.2d 1011, 1017, n.16 (5th Cir. 1971), and *Lazard v. Boeing Co.*, 322 F.Supp. 343 (E.D. La. 1971). As the Court of Appeals for the Fifth Circuit held in *Page v. U.S.*

Industries, Inc., supra, 556 F.2d at 352 n. 6:

> "We recognize that dicta in *Boudreaux v. Baton Rouge Marine Contracting Co.,* 437 F.2d 1011 (5th Cir. 1971), suggested that section 1981 claims are contractual and governed by the ten-year prescriptive period. 437 F.2d at 1017 n. 16. But we are not bound by dicta, and we have recently *rejected* these in favor of the analysis we employ here. *See Ingram v. Steven Robert Corp.,* 547 F.2d 1260, 1263 (5th Cir. 1977)."

Using a tort analytical approach, as mandated by the Supreme Court and the Fifth Circuit, it is beyond doubt that the District Court (as affirmed by the Fifth Circuit) acted properly in dismissing, pursuant to Rule 12(b) (1) of the Federal Rules of Civil Procedure, all of Heyn's Complaint that preceded the one-year statute of limitations. Recently, Mr. Justice Powell again stated the settled rule that Title 42 U.S.C. § 1983 "is to be read in harmony with general principles of tort immunities and defenses rather than in derogation of them." *Imbler v. Pachtman,* 424 U.S. 409, 418 (1976). Similarly, the Fifth Circuit observed in *Watkins v. Scott Paper Co.,* 530 F.2d 1159, 1197 (5th Cir. 1976), that a plaintiff's civil rights claim for back pay "sounds in tort, not in contract." *Heyn, supra,* 417 F. Supp. at 605.

In his deposition, Dr. Heyn candidly admitted that he had been waiting for ten years to bring this lawsuit. Heyn Depo. at p. 88 (R. 421). As the petitioner stated: "I have waited a long time, ten years, to decide to do it, when all the channels were exhausted." *Heyn, supra,* 417 F.Supp. at 606 n. 4. To circumvent this obvious problem of staleness,

petitioner now argues that a ten-year statute of limitations (Louisiana Civil Code, Article 3544) should be adopted for §1983 actions filed in federal courts sitting in Louisiana. Such an argument is without merit in law as well as in fact when it is recalled that petitioner's original Complaint characterized his alleged injury as follows: false accusations, harassment, intimidation, professional indignities, invidious discrimination, abuse, oppression, numerous unfounded charges, interference with scientific equipment, unfair teaching assignments, unfair teaching schedules, interference with sabbatical leave privileges, and so forth, all of which occurred prior to 1972; *i.e.,* over one year prior to the institution of suit. Such claims are indistinguishable from traditional intentional tortious theories of action under Louisiana Civil Code, Article 2315, which always activate the Louisiana one-year statute of limitations found at Louisiana Civil Code, Article 3536.

In view of the recent Fifth Circuit decisions of *Page, supra,* and *Ingram, supra,* it cannot be said that a conflict exists either within the Fifth Circuit or generally between the Circuits. While the statute of limitations for a 1983 action may vary from state to state depending on the forum state's prescriptive period for delictual offenses, the crucial element is the fact that the approach does not vary and thus the Circuits do not differ on a substantial question of law.

I.A. *The Supremacy Clause and the Louisiana One-Year Statute of Limitations for Section 1983 Claims.*

Petitioner Heyn has for the first time in his application for certiorari raised the issue that the Louisiana one-year statute of limitations for all "offenses and quasi offenses"

(i.e., torts) is somehow violative of the Supremacy Clause of the United States Constitution, Article VI, Clause 2. The only support offered for this contention is three federal district court opinions arising from the State of Virginia. A review of those decisions, *Brown v. Blake & Bane, Inc.*, 409 F.Supp 1246 (E.D. Va. 1976); *Edgerton v. Puckett*, 391 F.Supp. 463 (W.D. Va. 1975); *Van Horn v. Lukhard*, 392 F.Supp. 384 (E.D. Va. 1975), reveals, however, an obvious distinction. While the Virginia statute of limitations for torts is generally two years, the Virginia General Assembly enacted a special one-year statute of limitations for civil rights actions. Such an arbitrary classification was accordingly ruled unconstitutional because it "unreasonably discriminates against the maintenance of § 1983, 'constitutional tort' actions." *Van Horn, supra*, 392 F. Supp. at 388.

In Louisiana, on the other hand, the same one-year statute of limitations is applied evenly to all tortious causes of action. Thus, until Congress legislates a uniform prescriptive period for 42 U.S.C. §1983, a problem of constitutional magnitude does not arise so long as the forum state does not assign to civil rights suits a limitations period which is distinctly different from the limitations period assigned to other tortious offenses. For the foregoing reasons, petitioner's assignment of error under the Supremacy Clause is without merit.

I.B. *Commencement of the Statute of Limitations for a Section 1983 Cause of Action*

Petitioner argues that because he complained continuously and to numerous people from 1963 until 1976 about the terms and conditions of his employment as a

tenured member of the U.N.O. faculty, he somehow stopped the statute of limitations from running during that period. This is another unsupported, novel theory being advanced by the petitioner-professor. The argument is patently meritless. No authority is known to exist whereby a prescriptive period can be tolled because the complainant wrote grievance letters to the State Governor, State Attorney General, State Board of Regents, L.S.U. Board of Supervisors, U.N.O. Chancellor, Vice Chancellor, Dean, Department Chairmen, and the American Association of University Professors. To accede to such a theory would emasculate statutes of limitations.

Recently, the United States Supreme Court, in *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 461 (1975), discredited the notion that filing a timely charge of employment discrimination with the Equal Employment Opportunity Commission would interrupt and toll prescription as to an independent claim of discrimination under 42 U. S. C. § 1981, notwithstanding the same factual basis for the two actions.

Likewise, this Court even more recently in *International Union of Electrical, Radio and Machine Workers v. Robbins & Myers, Inc.*, 50 L.Ed. 2d 427 (1976), held that a timely filed union grievance would not serve to lengthen the 180-day period within which charges of employment discrimination must be filed with the E.E.O.C. following the alleged act of discrimination. In other words, an employee who exercises his rights under a collective bargaining agreement cannot thereby expect the limitations period for bringing a discrimination charge against the employer to be extended until the union proceeding is concluded. Such a conclusion is necessary and logical and a contrary rule would

vitiate the salutary policy of the doctrine of repose designed to protect defendants. This case is not even roughly analogous to *Burnett v. New York Central R. Co.*, 380 U.S. 424, 428(1965), in that petitioner Heyn was never "prevented from asserting" his rights. In fact, by his own testimony, Professor Heyn made a conscious decision to wait ten years prior to filing suit. Heyn Dep. p. 87 (R. 421). Accordingly, there can be no equitable tolling of the one-year prescriptive period. It is submitted that the rationale of *Johnson* and *Robbins & Myers* is directly applicable to Professor Heyn's case and that the non-mandatory actions (a prolonged letter-writing campaign) taken by Dr. Heyn had no bearing whatsoever on the one-year statute of limitations which governs all of the claims in this litigation.

In *R.J. Reynolds Tobacco Co. v. Hudson*, 314 F.2d 776, 781 (5th Cir. 1963), Judge Wisdom discussed the issue and laid to rest the contention that petitioner may go beyond the statute of limitations to recover damages on the theory of a continuing injury. Furthermore, *Hudson* held: "'*[i]t is only when one does not know that he has suffered an actionable injury that the statute is tolled.*' " 314 F.2d at 781 (emphasis in original), quoting from *McLaughlin v. Western Union Telegraph Co.*, 17 F.2d 574 (5th Cir. 1927).

As the District Court stated, when faced with this novel argument by Heyn:

> The fact that actions on the part of Defendants (i.e., the wrongful denial of promotion) were allegedly still causing Plaintiff injury after July 31, 1972 is not relevant to a determination of the date on which the one-year limitation period began to run. Prescription began to run from the date the alleged act which caused the alleged injury took place. Plaintiff admits that he had been planning to bring this suit for over ten years. *Indeed if it were otherwise, once injured, a plaintiff's suit would never prescribe.*

417 F.Supp. at 605-06 (emphasis added).

II. *Petitioner's Untimely Attempt to Amend the Complaint*

A review of the Record will reveal the following chronology of events in this litigation in the Trial Court:

(1) July 31, 1973: Complaint Filed.

(2) September 20, 1973: Answer Filed on Behalf of All Defendants.

(3) May 27, 1975: Original Pretrial Conference Date (Continued).

(4) June 16, 1975: Original Trial Date (Continued).

(5) October 24, 1975: Final Pretrial Order Was Submitted.

(6) October 28, 1975: Final Pretrial Conference Was Held.

(7) November 12, 1975: Plaintiff Filed a Motion to Amend His Complaint.

(8) December 15, 1975: Nonjury Trial on the Merits was Scheduled (But Not Held).

As this schedule of developments denotes, two and a half years after the litigation commenced and *after* the final pretrial conference, a motion was filed by Professor Heyn seeking, *inter alia*, to add a new cause of action for defamation, to request an award of attorneys' fees, to request a trial by jury, and otherwise to allege a deprivation of due process. Under any standard the motion to amend was untimely and the District Court acted within its discretion in dismissing the motion and the amendment as moot when the respondents were granted dismissal and summary judgment.

It is submitted that Professor Heyn's attempted amendment was nothing more than an effort to prolong his unwarranted presence in court and an indirect method of defeating the University's well founded motion for dismissal and summary judgment. The Trial Court acted properly in refusing to condone or permit such a spurious tactic by the petitioner. Ample support for refusing to permit the amendment is found in *Nevels v. Ford Motor Co.*, 439 F.2d 251, 257 (5th Cir. 1971):

> While it is generally true that leave to file amendments should be freely given, Fed. R. Civ. P. 15(A), amendments should be tendered *no later than the time of pretrial*, unless *compelling* reasons why this could not have been done are presented. (Emphasis added.)

Certainly, Heyn, the source and conduit of the information comprising the allegations in his Amended Complaint,

could not demonstrate a "*compelling*" reason for waiting until after the Final Pretrial Conference to make the instant motion which was obviously calculated to win for the petitioner another continuance. As in *Nevels, supra*, the Motion to Amend was properly disallowed. Furthermore, as *Nevels* teaches, it was the petitioner who had the burden of presenting the compelling reason for the last-minute proposed amendment. Heyn completely failed to carry his burden and the refusal to permit the amended pleading (whether due to mootness or otherwise) was therefore entirely justified.

The Court's attention is respectfully directed also to the cases of *Ricciuti v. Voltare Tubes, Inc.*, 277 F.2d 809 (2d Cir. 1960) (amendment should *not* have been permitted due to excessive delay); *United States v. An Article of Drug*, 320 F.2d 564, 573 (3d Cir. 1963) (permitting amendment *exceeded* court's discretion due to prejudicial nature of untimely allegations); *Stiegele v. J. M. Moore Import-Export Co.*, 312 F.2d 588 (2d Cir. 1963); *Caddy-Imler Creations, Inc. v. Caddy*, 299 F.2d 79, 84 (9th Cir. 1963) (no abuse of discretion in *refusing* to allow untimely amendment where plaintiff sought to change the legal theory of his case).

A further and equally valid reason for the disallowance of a motion to interject a non-federal cause of action for defamation into a 42 U.S.C. § 1983 civil rights suit is the failure of the putative amendment to state a claim upon which relief could have been granted. The controversy surrounding the so-called defamation involved only two letters written by respondent Manuel Ibanez in 1966 and 1967, when he was Chairman of the U.N.O. Department of Biology. These letters were written in the ordinary course

of business in 1966 and 1967, respectively, by Ibanez and were addressed to Dean Good. Basically, the two letters contain the same message: a recommendation from Chairman Ibanez to his superior, Dean Good, that an inquiry be made to determine if Professor Heyn should be allowed to retain his tenure. (R. 483 and 599.)

Ibanez stated reasons in support of his recommendation and, thereafter, Dean Good discussed the matter with his superior, Vice Chancellor for Academic Affairs, Dr. Branam. Subsequently, an administrative, and necessarily subjective, decision was made to forego any action on the Ibanez recommendation. The two letters were filed and never surfaced or became public until this litigation commenced and all University files on Heyn were turned over to Professor Heyn's attorneys in early 1975. Then, in late 1975, petitioner decided that he had been defamed by the two letters; hence, the Motion to Amend the Complaint.

Petitioner Heyn did not claim that his alleged injury due to defamation was actionable under 42 U.S.C. § 1983, and, clearly, it is not. *Morey v. Independent School District*, 312 F.Supp. 1257, 1263 (D. Minn. 1969), *aff'd*, 429 F.2d 428 (8th Cir. 1970) (per curiam). It was proper to refuse to countenance the filing of an untimely amendment containing a separate cause of action on a new legal theory relative to a non-federal claim. The Louisiana State Court system is well equipped to handle such claims and, indeed, it is extremely noteworthy that Professor Heyn, on March 31, 1976, filed a "Petition for Defamation" in the Civil District Court for the Parish of Orleans, State of Louisiana, entitled, *Anton N. J. Heyn v. Board of Supervisors of Louisiana State University and Agricultural and Mechanical College, et al.*, No. 76-4937, Division "J", Docket 4.

(R. 698-713.)

While this is not the proper time for an in-depth discussion of the lack of merit in Dr. Heyn's libel claim, the Court can, nevertheless, take cognizance of the qualified privilege that attaches to communications of the kind in question, thereby voiding and defeating such defamation suits. First, it is well established that " ' the *mere* presence of derogatory information in confidential files' does *not* infringe an individual's liberty interest." *Ortwein v. Mackey*, 511 F.2d 696, 699 (5th Cir. 1975), citing *Sims v. Fox*, 492 F.2d 1088 (5th Cir. 1974); accord, *Kaprelian v. Texas Woman's University*, 509 F.2d 133, 139 (5th Cir. 1975).

Secondly, in *Greenya v. George Washington University*, 512 F.2d 556, 563 (D.C. Cir. 1975), an extremely pertinent and analogous case, Circuit Judge Wilkey held that:

> It is well accepted that officers and faculty members of educational organizations enjoy a qualified privilege to discuss the qualifications and character of fellow officers and faculty members, if the matter communicated is pertinent to the functioning of the educational institution. Concomitantly we believe the privilege extends to internal records in which such matters are discussed or recorded. For a plaintiff to overcome the privilege he must prove that a publication occurred outside normal channels or that the normal manner of handling such information resulted in an unreasonable degree of publication in light of the purposes of the privilege or that publication was made with malicious intent. (Footnotes omitted.)

On the basis of *Greenya* and because Heyn has not shown (nor could he show) that the communications complained of between his Department Chairman (Ibanez) and his Dean (Good) occurred outside normal channels or resulted in an unreasonable degree of publication, the libel cause of action would be an appropriate target for a motion for summary judgment – which, of course, would only serve to further delay this case. It seems as though Heyn, in his hindsight, regrets that the respondents have always maintained privacy and confidentiality as to the Heyn file.

The doctrine of *Greenya* has very recently gained recognition and acceptance in Louisiana in *Alford v. Georgia-Pacific Corp.*, 331 So. 2d 558 (La. App. 1st Cir. 1976), which stands for the proposition that a conditional privilege attaches to statements made by an employer with respect to present or past employees to any person who has a "legitimate interest" in the subject matter. As the Louisiana Court ruled:

> We feel that it would be an undue burden to place on employers and would hopelessly hinder the free exchange of opinions between them if the law did not afford some form of protection. To hold otherwise would either tend to stifle communication of qualification and character evaluations, inherently subjective in nature, or alternatively, would breed deception in its wake. This we cannot condone as we feel community and societal interest dictate otherwise.
>
> 331 So. 2d at 562.

Professor Heyn belatedly asserted that he was professionally injured due to defamation by previously undisclosed letters contained in an intra-University file that was maintained in privacy and confidentiality. The District Court rightfully dismissed the amendment as moot since the federal claims were independently held invalid. In retrospect, one might review this Record and conclude that it was Dr. Ibanez, and not Heyn, who was injured. For example, in his deposition (R. 421), Heyn claimed that Chairman Ibanez was incompetent and went on to maintain that Ibanez had written only one two-page article and had obtained only one $4,000.00 grant. In fact, Dr. Ibanez has authored forty (40) scholarly articles and he has obtained for U.N.O. over $45,000.00 in educational or research grants. (R. 483 and 599 and Exhibits.)

In closing, it is noted that the Court of Appeals recently decided a similar issue involving a claim of reputation injury in *Wood v. University of Southern Mississippi*, 539 F.2d 529, 532 (5th Cir. 1976), and there held:

> . . .It was not until the discovery stage of this lawsuit that the immorality charges against [Plaintiff] surfaced. The injury to [Plaintiff's] reputation was thus inflicted at the trial and was not the result of any administrative action taken by the University. See *Ortwein v. Mackey*, 5th Cir. 1975, 511 F.2d 696, 699.
>
> 539 F.2d at 532.

III. *Summary Judgment on the Non-Prescribed Civil Rights Claims Was Proper*

Professor Heyn was employed at U.N.O. for thirteen

years, during which time he was never suspended or terminated (until his mandatory retirement at age 70 in May of 1976). Nevertheless, he found much to his disliking in terms of the personnel decisions made concerning him. While this was an unfortunate situation that caused considerable strife to many people, it is not a situation of constitutional dimensions. As the Supreme Court recently held in *Bishop v. Wood*, 426 U.S. 341, 349-50 (1976):

> The federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies. We must accept the harsh fact that numerous individual mistakes are inevitable in the day-to-day administration of our affairs. The United States Constitution cannot feasibly be construed to require federal judicial review for every such error . . .The Due process Claude of the Fourteenth Amendment is not a guarantee against incorrect or ill-advised personnel decisions.

When petitioner's many claims are viewed in the context of the extensive, almost unending, discovery program conducted by his three attorneys, it is seen that summary judgment was proper not only for the one-year period (July 31, 1972-July 30, 1973) immediately preceding institution of suit, but, likewise, Rule 56, F.R. Civ. P., would have been applicable to the entire litigation, going back to 1963, had not the statute of limitations defense been available. 6 J. Moore, *Federal Practice* ¶56.04 [1] (2d ed. 1976).

As the Fifth Circuit stated recently in *Lester v. Hanover Insurance Co.*, 488 F.2d 976 (5th Cir. 1974):

> The facts were rather fully developed during extensive discovery and the submission of affidavits. The appellant was unable to add substance to the conclusory allegations of his complaint. Summary judgment is appropriate if there is no genuine issue as to any material fact to be resolved. *Cf.* Owens v. Diamond M Drilling Company, 487 F.2d 74 (5th Cir. 1973).

Similarly, in *Curl v. International Business Machines Corp.*, 517 F.2d 212, 213, (5 th Cir. 1975), the Court of Appeals reiterated the well-settled principle that:

> "[W]hen a movant makes out a convincing showing that genuine issues of fact are lacking, we require that the adversary adequately demonstrate by *receivable facts* that a real, not formal controversy exists . . ." *Bruce Construction Corp. v. United States*, 242 F.2d 873, 875 (5th Cir. 1957).

As documented in the Factual Background, *supra*, and as further depicted throughout the voluminous Record, the petitioner has succeeded in adding absolutely no substance to the conclusory allegations of his Complaint. This is a lawsuit of conjecture and speculation with overtones of paranoia and despite the extensive and expensive undertakings of discovery there is not the slightest evidence that Professor Heyn was ever treated arbitrarily or capriciously.

As Chief Judge Brown stated in *DeBardeleben v. Cummings*, 453 F.2d 320, 324 (5th Cir. 1972), "[t]here is no impediment to the entry of summary judgment when the

dispute is verbal rather than factual." The Court further observed that it is only the District Court, not the adverse party, that must be satisfied that no genuine issue of fact exists. *Id.*

The Fifth Circuit has long recognized that the purpose of the summary judgment doctrine is not to be thwarted where the controversy is formal rather than real. *Bruce Construction Corp. v. United States*, 242 F.2d 873, 847-875 (5th Cir. 1957); *Wilkenson v. Powell*, 149 F.2d 335, 337 (5th Cir. 1945).

A recent federal decision that closely parallels the instant factual setting is *Cotten v. Board of Regents of the University System of Georgia*, 395 F. Supp. 388 (S.D. Ga. 1974), *aff'd mem.*, 515 F.2d 1098 (5th Cir. 1975), wherein the District Judge, in painstaking detail, documents and discusses an intra-faculty personality problem of the magnitude of Dr. Anton Heyn. In granting summary judgment for the defendants, the Trial Court concluded, 395 F.Supp. at 394:

> Further, the record is devoid of support for Dr. Cotten's theory that the defendants' action was constitutionally impermissible because taken for the purpose of punishing him for the exercise of his First Amendment rights to freedom of speech and association.
>
> * * *
>
> Finally, the plaintiff's claim of arbitrariness is patently meritless. The record is replete with instances of good faith attempts by the defendants tofind alternative resolutions to the nagging

> problems created by the Ahlquist-Cotten conflict. Good and valid factors were continually weighed by the defendants and no showing of arbitrariness appears in the record.

After over four years of litigation and an almost interminable discovery process, it is rather incredible that Professor Heyn's only basis for his allegedly discriminatory treatment is his outspoken claim against the idea of U.N.O. separating itself from the L.S.U. System, whether in name or otherwise. As documented in respondents' uncontroverted depositions, respondents were in *agreement* with petitioner on this issue, except to the extent that Chancellor Hitt at one time favored the change of name from L.S.U. N.O. to U.N.O. In other words, respondents Ibanez, Good and Branam (and Hitt as far as the issue of separation from the L.S.U. System was concerned) *agreed* and concurred with the sentiments of Dr. Heyn. This irrefutable situation illustrates clearly the sham and harassment of this lawsuit.

The hundreds of documents already before the Court, the authenticity and admissibility of which have been agreed upon, present a striking picture of Professor Heyn as the man whose personality clashed with numerous people, including superiors, contemporaries, and subordinates.

It is submitted that the legal standard by which Heyn's claim must be judged is: was his treatment arbitrary, frivolous or capricious? *Cotten, supra.* In *Blunt v. Marion County School Board*, 515 F.2d 951, 956 (5th Cir. 1975), Judge Coleman stated:

> For sound policy reasons, courts are loathe to intrude upon the internal affairs of local school authorities in such matters as teacher competency

Accord, *Megill v. Board of Regents of State of Florida*, 541 F.2d 1073, 1077 (5th Cir. 1976); *Ferguson v. Thomas*, 430 F.2d 852, 857 (5th Cir. 1970); *Shanley v. Northeast Independent School District*, 462 F.2d 960, 967 (5th Cir. 1972).

Similarly, in *Markwell v. Culwell*, 515 F.2d 1258, 1260 (5th Cir. 1975), the Court affirmed a grant of summary judgment in favor of San Antonio College on the ground that the District Judge was correct in concluding that there was no evidence of a causal link between the plaintiff-teacher's statements and the defendants' termination of the plaintiff. Likewise, in *Kaprelian v. Texas Woman's University*, 509 F.2d 133 (5th Cir. 1975), notwithstanding the plaintiff's contention of discrimination due to the free exercise of her First Amendment freedoms, the Fifth Circuit stated, 509 F.2d at 137:

> A liberty interest arises, for example, when one is publicly subjected to a badge of infamy, such as being "posted" as a drunkard. In plaintiff's context, it arises when an employee is able to demonstrate that the State has made a charge "that might seriously damage his standing and associations in his community" or that is of such a nature as to impose "a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities." Such a showing is the employee's voucher of admission to the arena of procedural due process; *without it such questions do not arise.* Moreover, to raise a liberty interest such charges *must be public ones;* we have recently held that even

> charges of the most damaging nature do not do so by their mere presence in confidential files. (Emphasis added.)

See also *Ortwein v. Mackey*, 511 F.2d 696, 699 (5th Cir. 1975).

It is established beyond any possibility of doubt that respondents have never made public charges against Professor Heyn. In fact, Heyn freely conceded such in his Deposition at pages 100-101 (R. 421). This in itself precluded any issue of fact for trial in the lower court. *Paul v. Davis*, 424 U.S. 693 (1976). The personnel file maintained by the University relative to Heyn does not reflect defamatory or unconstitutional charges; rather, these records document a story of ten long, hard years of administrative negotiations and constant communications, whereby Drs. Carlton, Ibanez, Good, Branam, Hitt, and Laseter have tried, often without success, to create harmony in the Department of Biology and to insure that every faculty member was treated fairly and equitably according to individual merit and based on reasonable, objective and just factors according to the circumstances as they appeared at the time. This is the essence of what Judge Alaimo referred to as *"the exercise of . . . sound judgment." Cotten, supra*, 395 F.Supp. at 392. Again, it must be emphasized that in ruling on the motion for summary judgment it was only necessary that the Court below analyze this suit over the period of the July, 1972 - July, 1973 twelve-month period in that this is the only relevant time frame in view of the statute of limitations. As to that one-year period discovery illustrated the absence of a genuine issue as to any material fact and thus respondents were entitled to judgment as a matter of law.

The Court's attention is further directed to the analogous situation that arose in *Morey v. Independent School District*, 312 F.Supp. 1257, 1262 (D. Minn. 1969), *aff'd*, 429 F.2d 428 (8th Cir. 1970) (per curiam). There District Judge Lord, in granting defendants' Motion for Dismissal due to lack of jurisdiction, held:

> The holding and policy of *Freeman* is applicable to this case. This Court is unaware of any Minnesota statute or regulation entitling plaintiff to periodic salary increases. Insofar as the defendant school district may customarily grant increases in salary to its teachers, this is an internal matter to be handled by the school board. The failure or refusal of the board to grant a customary increase in salary does *not* entitle plaintiff to bring an action in federal court under the Civil Rights Act.
>
> * * * *
>
> . . .Furthermore, the statement in her complaint that the failure to grant said increases is in violation of her "due process and equal protection rights" does *not* state a cause of action.
>
> 312 F.Supp. at 1262 (emphasis added).

In affirming, the Eighth Circuit expressly approved of Judge Lord's reasoning and adopted his opinion as its own. 429 F.2d 428 (8th Cir. 1970). See also *Freeman v. Gould Special School District*, 405 F.2d 1153 (8th Cir. 1969).

In Louisiana, like Minnesota, there is no statute or regulation giving L.S.U. System employees, such as Dr. Heyn, automatic salary increases. In fact, until 1974 and 1975,

there had not been any automatic cost of living increases (R. 556, Response No. 7); rather, previously by the Regulations and By-Laws of the L.S.U. System, all such increases were on the basis of merit. Now, petitioner is asking this Court to pass judgment on his professional and academic merit or lack thereof. This is precisely what the courts have time and again refused to do. A familiar holding in the Fifth Circuit is that "[i]t is axiomatic that federal courts should not lightly interfere with the day-to-day operation of schools." *Augustus v. School Board of Escambia County*, 507 F.2d 152, 155 (5th Cir. 1975); *Wright v. Houston Independent School District*, 486 F.2d 137, 138 (5th Cir. 1973), *cert. denied*, 417 U.S. 969 (1974); *Keys v. Sawyer*, 353 F.Supp. 936, 939-40 (S.D. Tex. 1973). Federal courts elsewhere have likewise abstained from interfering in campus affairs. See, *e.g.*, *Robinson v. Board of Regents*, 475 F. 2d 707, 710 (6th Cir. 1973); *Depperman v. University of Kentucky*, 371 F.Supp. 73, 76 (E.D. Ky. 1974).

An appropriate response to Professor Heyn's request for judicial intervention was framed by the Fifth Circuit in *Augustus v. School Board of Escambia County, supra*, 507 F.2d at 158:

> It is not the responsibility of the federal courts, however, to run public schools absent an abrogation of the responsibility by those whose duty it is to run a constitutionally acceptable school system.

Respondents submit that Heyn has failed to sustain, even minimally, his burden of demonstrating an "abrogation of responsibility" by the University officials.

CONCLUSION

The decisions of the United States District Court for the Eastern District of Louisiana and the United States Court of Appeals for the Fifth Circuit are in complete accord with the applicable decisions of this Court regarding the appropriate statute of limitations in cases filed pursuant to Title 42 U.S.C. Section 1983. The Petition for Certiorari offers no special or important reason why this Court should review a clearly correct decision of the Court of Appeals. Certiorari should be denied.

Respectfully submitted,

PHELPS, DUNBAR, MARKS,
CLAVERIE & SIMS

BY: _____
RUTLEDGE C. CLEMENT, JR.

BY: _____
HARRY A. ROSENBERG
1300 Hibernia Bank Building
New Orleans, Louisiana 70112
Telephone: (504) 566-1311

Attorneys for Respondents

November 18, 1977

CERTIFICATE OF SERVICE

I, Rutledge C. Clement, Jr., hereby certify that three copies of the foregoing Brief by Respondents in Opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit have been served upon counsel for Anton N.J. Heyn, petitioner, by depositing same in the United States mail, properly addressed and postage prepaid, this 18th day of November, 1977, as follows:

Robert E. Barkley, Jr., Esq.
Sessions, Fishman, Rosenson,
Snellings & Boisfontaine
2100 Bank of New Orleans Building
New Orleans, Louisiana 70112

It is further certified that all parties required to be served have been served.

This is the 18th day of November, 1977, at New Orleans, Louisiana.

_____
RUTLEDGE C. CLEMENT, JR.